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In the Supreme Court of the United States

OCTOBER TERM, 1983

ALEXANDER L. STEVAS,
CLERK

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by refusing to execute a contract embodying the agreement reached by petitioner and the Union.

2. Whether the Board reasonably determined that employees Bishop, Hughes, and Barlow did not engage in such serious strike misconduct as to render them unfit for further employment by petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
a. <i>Hughes and Bishop</i>	11
b. <i>Barlow</i>	14
Conclusion	15

TABLE OF AUTHORITIES

Cases:

<i>Associated Grocers of New England, Inc. v. NLRB</i> , 562 F.2d 1333, on remand, 238 N.L.R.B. 871	10, 11, 12, 13, 14
<i>Coronet Casuals, Inc.</i> , 207 N.L.R.B. 304	6
<i>Crown Central Petroleum Corp. v. NLRB</i> , 430 F.2d 724	14
<i>George Banta Co.</i> , 256 N.L.R.B. 1197, enforced, 686 F.2d 10, cert. denied, No. 82-1162 (Apr. 18, 1983)	13
<i>H. K. Porter Co. v. NLRB</i> , 397 U.S. 99	8
<i>Limestone Apparel Corp.</i> , 255 N.L.R.B. 722	13
<i>Linn v. United Plant Guard Workers, Local 114</i> , 383 U.S. 53	14
<i>Midwest Solvents, Inc. v. NLRB</i> , 696 F.2d 763	11, 12, 13
<i>Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc.</i> , 312 U.S. 287	10

IV

Page

Cases—Continued:

<i>NLRB v. American National Insurance Co.</i> , 343 U.S. 395	8
<i>NLRB b. Downs-Clark, Inc.</i> , 479 F.2d 546	9
<i>NLRB v. Moore Business Forms, Inc.</i> , 574 F.2d 835	13
<i>NLRB v. Terry Coach Industries, Inc.</i> , 411 F.2d 612	10
<i>NLRB v. W.C. McQuaide, Inc.</i> , 522 F.2d 519	11, 13, 14
<i>North Cambria Fuel Co. v. NLRB</i> , 645 F.2d 177	10
<i>Republic Steel Corp. v. NLRB</i> , 107 F.2d 472, cert. denied, 310 U.S. 655	11
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474	8, 11
<i>Youngdahl v. Rainfair, Inc.</i> , 355 U.S. 131	14

Statutes:

National Labor Relations Act, 29 U.S.C.
(& Supp. V) 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1)	5, 6
Section 8(a)(3), 29 U.S.C. 158(a)(3)	6
Section 8(a)(5), 29 U.S.C. 158(a)(5)	5

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 696 F.2d 931. The Board's decision and order (Pet. App. A25-A80) is reported at 258 N.L.R.B. 908.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. A petition for rehearing and suggestion for rehearing en banc was denied on April 8, 1983 (Pet. App. A23-A24). The petition for a writ of certiorari was filed on July 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 1979, petitioner and the International Laborers Union, Local No. 246, began negotiations for a collective bargaining agreement to replace the previous contract, which was to expire on October 31. The Union was represented by Business Agent Charles Barnes and, at two sessions, by Laborers International Regional Manager Howard Henson. Petitioner was represented by Director of Labor Relations Broughton Kelly. Pet. App. A26-A27, A51.

Having failed to reach an agreement by October 31, petitioner and the Union extended the existing contract until November 15. When no agreement had been reached by that date, all bargaining unit employees went on strike and established a picket line outside the plant (Pet. App. A27 n.2, A51).

Negotiations continued during the strike. On November 27, the parties met and reached agreement on some provisions, but remained apart on several major issues, including wages, seniority, departmental point systems, and lines of progression. At a meeting on December 3, petitioner put forth an amended proposal concerning seniority, departmental point systems, and lines of progression. Pet. App. A27. At the end of the December 3 meeting, petitioner's representative Kelly handed Henson, representing the Union, a list of striking employees whom petitioner planned to discipline for strike misconduct. As Kelly later acknowledged (Pet. App. A32), his purpose was merely to "get on the record" petitioner's view that discipline was warranted in the case of certain strikers. Kelly did not request negotiations on the subject of strike discipline, and Henson declined to discuss the matter, stating that it was between

the local union and petitioner. Pet. App. A27-A28, A31-A32, A52.¹

On December 9, the Union's negotiating committee voted to accept petitioner's proposals on all unsettled contract provisions, and sent petitioner a telegram stating (Pet. App. A27-A28, A52):

This is to advise you that the last company offer presented on December 3, 1979, has been accepted as a final and binding contract. All employees who could be contacted will return back to work on their regularly assigned shifts effective December 10, 1979[.] We are prepared to meet at your convenience to sign the agreement.

Two days later, however, Kelly notified the Union that several matters had to be resolved before an agreement could be made final. On the same day, Barnes wrote to Kelly requesting a meeting to arrive at final contract language so that the agreement could be signed. Pet. App. A52-A53.

When the parties next met, on December 19, petitioner gave the Union a "Memorandum of Agreement," containing proposals agreed to by the Union on December 9.² The memorandum also contained two strike-related proposals, not previously discussed, concerning the Union's acquiescence in the discharge of 25 strikers. Barnes reiterated the Union's agreement to the contractual provisions contained in the memorandum, but refused to sign the document

¹Because he was not a local union official, Henson's authority was limited to conveying the Union's position on various issues to petitioner and carrying back to the Union any proposal submitted by petitioner. Thus, upon receiving petitioner's proposals, Henson simply stated that he would present them to the negotiating committee. Pet. App. A31-A32.

²A federal mediator participated in the December 19 meeting (Pet. App. A53).

because of the inclusion of the new provisions. Pet. App. A54. Thereafter, the Union insisted that there was a collective bargaining agreement in effect, and petitioner insisted that there was not (Pet. App. A55-A56). Without any assistance from petitioner, the Union prepared a contract embodying its understanding of the contract terms, and delivered it to petitioner on July 11, 1980 (Pet. App. A56).

2. Meanwhile, on December 10, 1979, a number of formerly striking employees reported to the plant; but 25 of the strikers, including Landis Bishop, Jeffrey Hughes, and Preston Barlow, were discharged for strike misconduct (Pet. App. A62-A64).

Bishop and Hughes were discharged for their conduct during a visit to the home of non-striker William Walker. In the presence of Walker's pregnant wife and six year-old daughter, Bishop and Hughes, who had been drinking, asked Walker why he had returned to work and why he was not on the picket line. Walker, who was a probationary employee and had previously applied for membership in the Union, replied that he needed the money. Bishop and Hughes told Walker that he was "screwing them out of their . . . damn money." Bishop then said that if Walker returned to the plant Bishop would "take care of [him]." When Walker asked Bishop what he meant, Bishop started laughing and Hughes repeated the remark. During the exchange, Bishop and Hughes remained outside the house, talking to Walker through a closed screen door. Pet. App. A40, A66.

Barlow was discharged for making offensive comments about one of petitioner's supervisors. As Industrial Relations Manager Barbara Lawler drove through the picket line on her way to the plant, she heard Barlow refer to her as "that f----- bitch," and as "that mother f-----, that ugly bitch" (Pet. App. A67). On another occasion, Barlow again called Lawler a "bitch" (Pet. App. A41, A67).

3. The Board found that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to execute a contract embodying the agreement reached on December 9 (Pet. App. A39). In so holding, the Board found, contrary to the administrative law judge (ALJ), that petitioner did not raise striker discipline as a bargainable issue at the meeting on December 3, nor did petitioner make it a condition to agreement on the contract (Pet. App. A32-A33). The Board explained (Pet. App. A32; footnote omitted):

As is clear from the evidence presented by both parties, [petitioner] did not, at this juncture in the negotiations, present the issue of discipline of certain strikers as a proposal to be considered in conjunction with any of the then outstanding contractual issues. Thus, Kelly admitted under examination by counsel for the General Counsel that he did not inform Henson that he wished to negotiate or bargain about the list of strikers; and on direct examination Kelly revealed that his purpose was merely to "get on record" with the Union by letting its representative know that [petitioner] considered that form of discipline to be appropriate with respect to certain striking employees. Accordingly, the discussion on December 3 with respect to the issue of striker discipline, did not, under the circumstances herein, signify a change in [petitioner's] "bottom line" as to what it considered necessary to reach agreement on a contract.

The Board concluded that by December 9 petitioner had made specific contract proposals on all outstanding contractual issues and that the Union "capitulated on all outstanding issues" on that date (Pet. App. A35-A36). The Board further concluded that petitioner's subsequent refusal to acknowledge that agreement and its refusal to assist the Union in reducing the agreement to writing, rather than

signifying a failure to reach agreement, constituted an unlawful "obstruction and frustration of the bargaining process after agreement was reached" (Pet. App. A39).

The Board also found, in disagreement with the ALJ, that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging striking employees Bishop, Hughes, and Barlow (Pet. App. A40, A42). The Board concluded that "the statements made by the strikers Bishop and Hughes were ambiguous, and did not evidence a purpose to inflict physical harm or engage in any other foul play" (Pet. App. A40-A41 n.11). It concluded that "the actions of Bishop and Hughes constitute an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge" (Pet. App. A40). Similarly, the Board found that Barlow's conduct was "not sufficiently egregious" to warrant discharge, noting that his misconduct occurred on the picket line and that, " 'absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language' . . ." (Pet. App. A42, quoting *Coronet Casuals, Inc.*, 207 N.L.R.B. 304 (1973)).

4. The court of appeals upheld the Board's findings and enforced its order.

The court found that substantial evidence supported the Board's finding that the parties had reached agreement on a new contract (Pet. App. A14-A18). Agreeing with the Board that the striker discipline issue was not raised by petitioner as a bargainable issue, the court stated that "[a]t no point during negotiations did the Company indicate that a new contract was contingent upon resolution of this issue. * * * [T]he uncontroverted evidence reflects that the Company's purpose in raising the matter was to give the Union notice of its proposed action" (Pet. App. A15; footnote

omitted). The court further agreed with the Board that "as of December 9, all contractual provisions were the subject of specific proposals and had not been withdrawn prior to the Union's December 9 acceptance" (Pet. App. A16-A17), and that the Union's capitulation to petitioner's position on that date created a binding contract (Pet. App. A16). Concerning petitioner's contention that no agreement on an effective date of the contract was reached, the court stated that "neither the Company nor the Union sought to disrupt the continuity between the existing contract and the new one" (Pet. App. A17).

Finally, rejecting petitioner's contention that discrepancies in the document prepared by the Union showed that no agreement had been reached, the court stated (Pet. App. A18):

The Board has not required the Company to execute the Union's document, but rather a contract embodying the agreement reached between the parties on December 9. The Company is therefore required only to execute an agreement that accurately reflects the most recent proposals accepted by the Union in its December 9 telegram. The Board found discrepancies in the Union's document resulting not from lack of agreement, but due to the Company's refusal to assist the Union in reducing the agreement to writing prior to the resolution of the strike-related issue. We find no error in this ruling.

Relying on the "particular circumstances of this case," the court also upheld the Board's decision that "Bishop and Hughes' verbal threats were not sufficient to justify their termination from employment" (Pet. App. A20),³ and that

³Judge Clark dissented from this portion of the court's holding (Pet. App. A22).

Barlow's remarks "did not warrant his termination" (Pet. App. A21).

ARGUMENT

1. Petitioner contends (Pet. 17-19) that the Board improperly ordered it to adhere to contract terms to which it did not agree, in violation of this Court's decisions in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), and *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). However, as petitioner concedes (Pet. 21), resolution of this issue turns on whether substantial evidence supports the Board's finding, upheld by the court of appeals, that the parties did reach agreement on a contract. That fact-bound issue does not warrant review by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the record amply supports the Board's findings that the Union's acceptance, on December 9, of petitioner's outstanding offer created a binding collective bargaining agreement, and that petitioner obstructed and frustrated the bargaining process by refusing to assist the Union in reducing the parties' collective bargaining agreement to writing. Petitioner's principal contention (Pet. 18-19)⁴ is that the court exceeded its authority by "supply[ing]

⁴Petitioner also suggests, without elaboration, that "the written proposals did not contain * * * [a term specifying] duration, a date when wages would go into effect for each subsequent year of the contract and wage rates applicable to employees who would be temporarily assigned to higher paying jobs" (Pet. 19). Petitioner does not claim that these matters were at issue in the negotiations. The Board found that "all outstanding contractual issues" had been made the subject of specific proposals by December 9 and accepted by the Union (Pet. App. A35-A36). In large part, petitioner's ability to raise additional issues at this stage stems from its own disorganized mode of bargaining, which, as the Board observed (Pet. App. A36), "has made reconstruction of the events somewhat difficult, but not impossible." Petitioner had the opportunity in its "Memorandum of Agreement" of December 19 to clarify the issues, and the only area of contention raised by the Union was the discharge question, which had not previously been a subject of

a missing term" —i.e., an effective date — to the contract. However, the Board, affirmed by the court, simply concluded that the parties had impliedly agreed to an effective date of November 15, 1979. Substantial evidence supports this conclusion. As the Board stated (Pet. App. A34-A35), "the record reflects that the old contract expired on October 31, and that, throughout negotiations, neither side had articulated any proposal that would break the continuity between the expired contract and the new one. Indeed, that [petitioner] contemplated no such hiatus is obvious from its December 19 'Memorandum of Agreement' which calls for an effective date of November 1."⁵ That the parties did not execute a written document including the effective date does not affect this conclusion. The negotiations were conducted throughout without any written, integrated contract proposals (Pet. App. A6 n.1), and petitioner does not deny that agreement had been reached on other contract issues, similarly agreed to without being embodied in an integrated document.

Petitioner's reliance (Pet. 19) on *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546 (5th Cir. 1973), is misplaced. There the court found that there had been no meeting of the minds on wages, merit increases, or termination date. *Id.* at 548. Here, by contrast, the Board found that there was agreement on all material terms of the contract.

negotiation. Petitioner cannot now contend that the absence of unmentioned and unbargained-for provisions precludes the possibility of a contract.

⁵The old contract was extended by agreement of the parties from November 1 to November 15; thus the court reasonably concluded that the intended effective date of the new agreement was November 15 rather than the earlier date included in the Memorandum of Agreement (Pet. App. A17-A18 n.8).

Nor is there merit to petitioner's assertion (Pet. 19-21) that discrepancies between the agreement and the contract drafted by the Union in July, some seven months after the Union's acceptance, reflect a lack of agreement on material contractual provisions. As the Board found, any deviation from the proposals submitted by petitioner and agreed to by the Union on December 9 "is not indicative of a lack of agreement between the parties, but is rather the result of [petitioner]'s own refusal to acknowledge the existence of an agreement, as well as its refusal to assist the Union in reducing the agreement to writing" (Pet. App. A38-A39). Accordingly, as noted by the court (Pet. App. A18), the Board's order does not require petitioner to execute the July 11 document; petitioner is required only to execute a contract that accurately reflects its final offers, as accepted by the Union on December 9.⁶

2. Although an employer is not required to reinstate economic strikers after they return to work if it can demonstrate that they engaged in serious misconduct during the strike (*Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1336 (1st Cir. 1977)), the Board has considerable discretion in determining when misconduct is not so serious as to permit the strikers to be discharged. *Id.* at 1336; see *North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 181 (3d Cir. 1981); *NLRB v. Terry Coach Industries, Inc.*, 411 F.2d 612 (9th Cir. 1969); cf. *Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) (right of free speech on the picket line "cannot be denied" on the basis of "a trivial rough incident or a moment of animal

⁶Petitioner is obligated to assist the Union in drafting a contract accurately reflecting the December 9 agreement. In so doing, petitioner can ensure that inconsistencies between its proposals and the Union's draft of the parties' agreement are avoided.

exuberance"). Such judgments by the Board are necessary lest the employer's ability to discharge strikers on the pretext of minor disturbances render "the rights afforded to employees by the Act * * * illusory." *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939), cert. denied, 310 U.S. 655 (1940). The court correctly upheld the Board's conclusion that petitioner's discharge of Hughes, Bishop, and Barlow was unjustified. Further review by this Court is unwarranted. *Universal Camera Corp. v. NLRB*, 340 U.S. at 490-491.

a. *Hughes and Bishop*

The verbal formulations adopted by the courts for evaluating the seriousness of striker misconduct differ, as petitioner points out (Pet. 8). Compare *Associated Grocers of New England*, and *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977), with the decision below (Pet. App. A20); see also *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982) (noting the differences in formulation but finding it unnecessary to resolve them). But the holdings in these cases can as easily be attributed to variations in the factual circumstances as to any variations in the legal standards employed. Tested against the fact patterns of those cases, the Board's decision in this case is well within its discretion.

In *McQuaide*, the court upheld the Board's determination that one employee, whose conduct approximated that of Bishop and Hughes, was improperly discharged. The employee, Geisel, remarked to a non-striker who had escaped injury when a rock was thrown through the windshield of a truck, "Maybe next time you won't be so lucky." 552 F.2d at 526. The court agreed that Geisel's statement was too ambiguous to constitute serious misconduct (*id.* at 528). By contrast, the court found the conduct of another employee, Lavelly, too egregious to countenance. Lavelly followed a non-striker to a delivery point and said that

"we'll get you"; shook his fist at another truckdriver and said that he would "knock the g-- d--- s--- out of [him]" if he drove again; and told another truckdriver, "Scab, you're going to get yours" and partially blocked his egress (*id.* at 526-527, 528). Lavelly thus engaged in more than one isolated incident and his remarks were accompanied by physical acts and gestures which heightened their effect; the strike, moreover, was "marked by incidents of vandalism and harassment" (*id.* at 528). On these bases — entirely unlike the instant case — the court concluded that Lavelly's discharge was permissible.

Similarly, in *Associated Grocers of New England*, the First Circuit remanded to the Board for reconsideration the issue of the discharge of a striker, Paquette, who had informed a neighbor that to apply for a job at the truck facility might cause "repercussions," as strikebreakers historically had been retaliated against (562 F.2d at 1337). On remand the Board, applying the *McQuaide* test, found that Paquette's statements "did not have a tendency to coerce or intimidate." *Associated Grocers of New England, Inc.*, 238 N.L.R.B. 871, 872 (1978). By contrast, the *Associated Grocers* court also found that other strikers, Bourgeois, Samsom, and Moreau, had engaged in conduct so egregious as to deny them a right to reinstatement. Bourgeois threatened the lives of job applicants in the presence of 40-50 pickets. The applicants were so frightened that they did not enter the plant to complete the applications. Samsom and Moreau followed a supervisor down a lonely, dark road late at night and temporarily blocked his egress from a dead end road. 562 F.2d at 1336-1337.

Finally, in *Midwest Solvents* the court agreed with the Board that striker Donald Lassen, who went to a non-striking employee's apartment, urged him not to work, and warned him to " 'watch' himself, that 'some of the boys

might get rowdy' " (696 F.2d at 766), had not engaged in misconduct sufficiently serious to justify discharge.

The decision below is consistent with these precedents.⁷ Much like the workers whose discharges were overturned in *McQuaide*, *Associated Grocers*, and *Midwest Solvent*, Bishop and Hughes engaged in no violent acts or gestures. The surrounding circumstances of the strike, though not harmonious, did not involve threats or injuries to non-strikers. Rather, the evidence was consistent with a conclusion that Bishop and Hughes simply acted impulsively, after a night of drinking. And as the Board noted, their statements to Walker were "ambiguous, and did not evidence a purpose to inflict physical harm or engage in any other foul play" (Pet. App. A40-A41 n.11).

In determining whether strike misconduct deprives the employee of the Act's protection, the Board assesses "each incident of alleged misconduct * * * in light of the surrounding circumstances, including the severity and frequency of the involved employee's actions." *Limestone Apparel Corp.*, 255 N.L.R.B. 722, 739 (1981); see *George Banta Co.*, 256 N.L.R.B. 1197, 1224 (1981), enforced, 686 F.2d 10 (D.C. Cir. 1982), cert. denied, No. 82-1162 (Apr. 18, 1983). Applying these principles, and those of the cases cited by petitioner and discussed above, the court below was correct in upholding the Board's determination that "the actions of Bishop and Hughes constituted an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge" (Pet. App. A40). Any resolution of the

⁷Petitioner's reliance on *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), is also misplaced. In *Moore Business Forms*, which involved "continuing, pervasive violence" in connection with a strike (*id.* at 839), the court upheld the reinstatement of a number of employees (*id.* at 843), reversing the Board's order of reinstatement in seven individual cases of egregious conduct, all of them more extreme than the conduct of Bishop and Hughes in this case. See *id.* at 843-846.

differences between the circuits on the test to be applied to strike misconduct cases should await a case, unlike this one, in which the outcome hinges on the difference in the test rather than on the facts.

b. Barlow

The court of appeals applied settled principles of law when it sustained the Board's decision that Barlow's crude remarks to Industrial Relations Manager Lawler were not serious enough to justify discharge. See *McQuaide*, 552 F.2d at 528 ("the use of epithets, vulgar words or profanity does not deprive a striker of the protection of the Act"); *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970) ("passions run high in labor disputes and * * * epithets and accusations are commonplace"); see also *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 60-61 (1966); *Associated Grocers of New England*, 562 F.2d at 1335.

Petitioner's reliance (Pet. 16) on *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), is misplaced. There, the Court held that massed name-calling by large groups of striking employees, which was calculated and likely to provoke violence, could be enjoined by a state court. There is no issue here of the right of petitioner to invoke the aid of a state court to prevent violent conduct by striking employees. Nor does petitioner cite any authority for its assertion (Pet. 16) that "rarely could language such as used by Mr. Barlow be used by strikers against non-strikers without provoking violence." It did not provoke violence here, nor can it be considered unusual in the heated context of labor disputes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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